

GROWTH MANAGEMENT LITIGATION REPORT

TO: Board of County Commissioners
Richard Collins
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Timothy McGarry
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Thomas J. Willi
County Administrator

FROM: Derek Howard, Esq.
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DATE: April 1, 2005

Vacation Rentals

Neumont (Federal Class Action) – Plaintiffs filed a class action suit in U.S. District Court alleging vacation rental ordinance (Ordinance 004-1997) was prematurely enforced, is an unconstitutional taking of Plaintiffs' properties, and was adopted in violation of due process. On June 20, 2004, the U.S. District Court entered final judgment in favor of the County. On July 15, 2004, Plaintiffs/Appellants filed a notice of appeal to the U.S. Court of Appeals for the 11th Circuit from final judgment of the District Court, and all interlocutory orders giving rise to the judgment. On September 15, 2004, Appellants filed a motion to certify state-law questions to the Florida Supreme Court and to postpone briefing pending certification; the County filed its response on October 7; Appellants filed a reply on October 15, 2004. On October 18, 2004, a mediation conference was held. On October 19, 2004, the Court denied Appellants' motion to stay briefing and ruled motion to certify state-law questions to the Florida Supreme Court is carried with the case. Appellants filed their initial brief on December 15, 2004. Monroe County filed its response brief on February 22, 2005. Appellants filed their reply brief on March 11, 2005. (\$120,537.84 as of February 28, 2005).

Takings Claims

Emmert - Complaint seeking inverse condemnation based on partial granting of beneficial use application. Plaintiffs were granted partial beneficial use from wetland regulations, thus expanding the buildable area of their vacant Ocean Reef lot from approximately 1,800 to 2,500 square feet. However, Plaintiffs argue that they cannot build within this area due to Ocean Reef Club Association deed restrictions requiring setbacks in excess of those required by Monroe County. Plaintiffs allege that Monroe County's actions have resulted in a denial of all economic use of their property, despite expressly allowing a 2,500 square foot buildable area. Monroe County's motion to dismiss was denied on December 12, 2002. Mediation was held on October 21, 2004. Case was set for bench trial on November 29, 2004. On November 22, 2004, Plaintiffs filed an emergency motion for continuance; motion was heard and granted on November 24, 2004. On November 22, 2004, Plaintiffs also filed a motion for leave to file a second amended complaint in order to add a claim of

vested rights. The motion was heard on January 5, 2005. On March 10, 2005, the court entered an order granting Plaintiffs' motion for leave to file a second amended complaint; the complaint was filed on March 31, 2005. The County's answer is due on April 11, 2005. (\$63,932.45 as of February 28, 2005).

Galleon Bay – Three cases: (1) appeal of vested rights decision; (2) takings claim; and (3) third party complaint against State of Florida seeking contribution, indemnity and subrogation.

(1) On June 17, 2004, the 3rd D.C.A. denied the County's petition for writ of certiorari.

(2) As to takings claim, Judge Payne entered summary judgment in favor of Plaintiff on liability on November 10, 2003, finding both a temporary and permanent taking of the subject property. Case was scheduled to proceed with a jury trial as to damages on August 9, 2004. At the pretrial conference on July 26, 2004, however, Judge Payne agreed to modify his order on liability to find only a permanent taking on April 21, 1994, and granted Plaintiff's request to continue the trial until October 12, 2004. Plaintiff's counsel was delegated the task of reducing the Court's announced ruling to a proposed modified order. On August 18, 2004, Judge Payne entered final judgment in favor of the County as to Plaintiff Hannelore Schleu. On September 24, 2004, the County submitted a proposed modified order consistent with the Court's July 26, 2004, ruling. On October 3, 2004, Plaintiff submitted a proposed modified order that substantively contradicted and strayed from the Court's ruling; namely, the proposed order found a temporary taking occurred. On October 4, 2004, the Court entered verbatim Plaintiff's proposed modified order. The trial was subsequently continued until February 7, 2005. On October 22, 2004, the County filed a motion for rehearing arguing, *inter alia*, the verbatim entry of Plaintiff's proposed modified order violated the procedural due process rights of the County. On November 2, 2004, Plaintiff filed a reply to the County's motion for rehearing. On November 29, 2004, the County filed an amended motion for rehearing and/or motion for reconsideration. On December 13, 2004, the Court granted the County's motion and vacated the modified order of October 4, 2004. On December 27, 2004, the Court continued the trial and ordered the parties (including Third-Party Defendant State of Florida) to participate in nonbinding arbitration, which is scheduled to begin on May 5, 2005. The Assistant Florida Attorney General representing the State in the matter has been cooperative in coordinating with the County in preparing for the upcoming arbitration.

(3) As to third party complaint against State of Florida, the State moved to dismiss for failure to state a cause of action, as well as a motion to transfer action to the Second Judicial Circuit in and for Leon County, Florida. On May 24, 2004, the court denied the State's motion to dismiss as to the County's claim of contribution, as well as the State's motion to transfer. On May 24, 2004, the State moved to substitute the Department of Community Affairs and the Administration Commission as third party defendants. On July 27, 2004, the State filed a notice of appeal to the 3rd D.C.A. of the non-final order denying the motion to transfer venue and petition for writ of prohibition/certiorari. On August 24, 2004, the Court granted County's motion to hold appeal in abeyance. On August 25, 2004, the Court denied County's motion to hold petition in abeyance. The Court has deferred the deadline for the County to file its response, pending resolution of matters in the underlying action. (\$146,956.37 as of February 28, 2005; does not include prior Galleon Bay matters).

Good – Plaintiff is seeking declaratory relief and takings claim for ~16 acre Sugarloaf Shores property due to commercial moratorium which began January 4, 1996. Plaintiff is also pursuing

administrative requirements for filing a claim under the Bert Harris Act. The County's motion to dismiss is being held in abeyance until Plaintiff obtains a pre-application letter of understanding as to the level of development that is permissible on each parcel of property. Plaintiff and the County staff met on April 26, 2004, to discuss potential development. On February 14, 2005, the parties appeared before the court for a status conference. On February 17, 2005, Plaintiff Lloyd Good again met with County staff to discuss potential development. On March 7, 2005, the County issued a letter on the proposed development of Tracts A and B. (\$14,798.42 as of February 28, 2005).

Phelps/Hardin – Plaintiffs filed claim in federal court for due process and inverse condemnation based on code enforcement proceedings that resulted in a lien on Plaintiffs' property. Federal court entered judgment in favor of Monroe County due to reinstatement of state court appeal of code enforcement order. On August 10, 2004, the County filed a motion to dismiss the state court appeal for lack of prosecution. On September 27, 2004, the Court dismissed the appeal. On October 5, 2004, Plaintiff/Appellant filed a motion for rehearing of order granting motion to dismiss appeal. On November 5, 2004, the Court entered an order granting Appellant's motion for rehearing and setting aside and vacating dismissal. (\$6,577.93 as of February 28, 2005).

Kalan - Takings claim filed as to residential property in Cahill Pines & Palms subdivision for failure to obtain ROGO allocation in 4 year period. Based on County's motion to dismiss, the parties agreed to entry of an order holding the case in abeyance while Plaintiff seeks a beneficial use determination, as required to exhaust available administrative remedies and ripen the case for judicial review. On June 24, 2004, the Court entered an order requiring the County to render a beneficial use determination as to subject property within 90 days. On September 21, 2004, the Court granted the County's motion for an extension of time, extending the deadline for the County to render a beneficial use determination until January 20, 2005. On October 26, 2004, a beneficial use hearing was held before the Special Master. The County filed another motion to extend the deadline for the rendering of a beneficial use determination, which remains pending. On March 4, 2005, the Special Master rendered a proposed denial of beneficial use. (\$2,750.77 as of February 28, 2005).

Other Matters

Department of Community Affairs v. Monroe County - Case before Land and Water Adjudicatory Commission in which DCA alleges that the County failed to comply with various Comp Plan requirements by failing to routinely amend endangered species maps, and vegetation surveys as to high & moderate quality hammock areas. DCA also alleges that the County has allowed higher ROGO scores than should have been allocated due to failure to amend maps, thereby allowing more residential development than should have been approved. Case was set for administrative hearing in January 2004. DCA entered voluntary dismissal pending adoption of moratorium & revised regulations, but moved forward with appeals as to individual permits (see below). (\$14,796.42 as of February 28, 2005).

- **Department of Community Affairs v. Monroe County** - Pursuant to 380.07, *Florida Statutes*, DCA is appealing the building permit issued by Monroe County to Nancy Suarez-Cannon. DCA alleges that Monroe County did not correctly interpret and apply portions of its Comprehensive Plan and LDRs in scoring the application for development. On February 25, 2004, the ALJ dismissed Respondent Nancy Suarez-Cannon from the case because she sold the three subject lots to DC6, L.L.C. On May 4, 2004, DC6 (intervenor) sent settlement

proposal to DCA in which it proposes to relocate the subject building permit to a neighboring cleared lot (the neighboring lot is the subject of a code enforcement proceeding in which the County alleges the lot was illegally cleared). On November 4, 2004, DOAH granted the parties' joint motion for continuance and placed case in abeyance to allow for settlement negotiations. (\$1,297.00 as of February 28, 2005).

O'Daniel and Hills v. Monroe County - Appellants/Petitioners filed a vested rights claim in Circuit Court on March 13, 2002. Appellants/Petitioners also appealed finding of Code Enforcement Special Master that they were conducting a commercial business on the subject, which is in a residential zoning district, without having first obtained a special use permit. The court affirmed the Special Master's finding and order. The vested rights claim went to bench trial on May 25, 2004. On October 7, 2004, the Court entered its final judgment in favor of Appellants/Petitioners. The Court held that Appellants/Petitioners have vested rights to maintain a mixed residential/commercial structure on the subject property, and to use the subject property for both residential and commercial office purposes. The relief granted to Appellants/Petitioners is relatively narrow compared to the relief sought. The Court, for example, held that (1) any application for a change in commercial use is subject to current regulations regarding non-conforming structures and uses, and (2) the commercial portion of the structure must substantially comply with current standard building, electrical, mechanical and plumbing codes before a certificate of occupancy is issued. The Court did not vacate its prior order affirming the Code Enforcement Special Master order. On November 4, 2004, Petitioners filed motions to tax costs and for attorney's fees pursuant to § 57.105, Fla. Stat. On November 11, 2004, the County filed a motion to strike Petitioners' motion for attorney's fees. The motion was heard on January 13, 2005; order granting the motion was entered on February 9, 2005. On March 7, 2005, Petitioners filed a notice of appeal as to the order granting the County's motion to strike. (\$29,372.44 as of February 28, 2005).

Industrial Communications & Electronics - Federal case alleging wireless tower moratoria were unconstitutional on various grounds and violated Federal Telecommunications Act. Case was dismissed by trial court based on claims being identical to those brought in state court action and failure to reserve federal claims therein. Case is pending on appeal in the 11th Circuit. County filed its answer brief on March 1, 2004. Federal appeals court mediation process stayed the appeal pending action on I.C.E.'s proposed settlement, which was presented to and rejected by BOCC. Parties are awaiting setting of oral argument by 11th Circuit. (\$18,661.61 as of February 28, 2005).

Johnson - Writ of Mandamus challenging Director of Planning's determination that application for "boundary determination" by alleged error requires zoning map amendment application. Applicant applied for boundary determination based on allegation that BOCC previously adopted change in zoning. Director's determination was based on review of records failing to show any error or prior consideration of such zoning change. Director rejected application and informed owner to properly file for zoning map amendment. (Boundary determination may be placed on BOCC agenda without the public notice required for a zoning change). Pursuant to oral argument, Monroe County agreed to re-process application for denial or approval (application was previously returned as incomplete) and Plaintiffs may appeal as provided by the Monroe County Code if denied. (\$1,799.62 as of February 28, 2005).

Sierra Club, et al. v. Department of Community Affairs & Miami-Dade County (Monroe County as Intervenor) - On October 10, 2002, the Miami-Dade County Board of County Commissioners approved Ordinance No. 02-198, which amends the Land Use Element and Transportation Element of Miami Dade's Comprehensive Growth Management Plan to change the designation of Krome Avenue from a "Minor Roadway" (2 lanes) to a "Major Roadway" (3 or more lanes). On January 10, 2003, Petitioners filed a petition for formal administrative hearing to challenge DCA's finding this and other amendments to the Miami-Dade's Plan "in compliance" as defined in section 163.3184(1)(b), Fla. Stat. On December 16, 2003, the ALJ granted Monroe County's petition to intervene. On March 22, 2004, Miami-Dade filed a motion to relinquish jurisdiction to DCA (Petitioners' response is due on May 6, 2005). In December 2004, the parties reached a tentative settlement agreement, but the Board of County Commissioners of Miami-Dade County formally rejected the agreement on March 1, 2005. The case is set for final hearing on September 19 through 23 and 26 through 30, 2005. (Legal services are being provided by Morgan & Hendrick without charge to Monroe County).

Scotty's, et al. v. Monroe County - Appeal to DOAH of Planning Commission's denial of amendment to a major conditional use to demolish an existing structure and build a new Walgreens. Appellants filed notice of appeal on October 10, 2003. On February 16, 2004, ALJ granted Florida Keys Citizens Coalition's motion to intervene. Appellants filed their initial brief on May 4, 2004. Florida Keys Citizen Coalition (intervenor) filed its answer brief on June 8, 2004. The County filed its answer brief on August 26, 2004. Appellants filed a reply brief on November 8, 2004. Oral argument was held on January 31, 2005. On February 9, 2005, ALJ entered final order rejecting certain findings of the Planning Commission, but otherwise affirming the decision to deny application. (\$7,633.63 as of February 28, 2005).

Smart Planning and Growth Coalition v. Monroe County (Circuit Court Case No. 03-CA-507-P) - SPGC challenge of NROGO allocations based on allegation that allocations violate NROGO/Comp Plan provisions because Key Largo CommuniKeys Master Plan not yet adopted. Case was dismissed by DOAH for lack of jurisdiction. Plaintiffs filed action in circuit court on same grounds. County prevailed on its motion to dismiss for lack of jurisdiction on grounds that plaintiff is not an "aggrieved party," as required by section 163.3215, *Florida Statutes*. Plaintiffs filed an amended complaint on February 20, 2004. County filed its answer on March 5, 2004. (\$474.49 as of February 28, 2005).